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If this conference had been held a few decades ago, the mood among the law teacher conferees would have been very different than it is today. If the conference had been held then, the law professor conferees would be bemoaning the fact that most of their colleagues teaching substantive law courses regarded the advocacy courses with disdain or, at best, indifference. At that time, most law faculty members dismissed the advocacy courses as "amusement" for students rather than "serious work."[1] The vast majority of law teachers were skeptical of the educational value of advocacy courses.[2] Traditionalists assigned the advocacy courses low curricular priority, and the courses tended to be staffed by part-time teachers who were not on tenure track.[3] In part because most of the part-time professors teaching the courses were busy practitioners with other demands on their time, the materials used in the courses were poorly organized and conceived; the part-time professors had little time to devote to the preparation of the teaching materials.

Fortunately, within the past few decades, law school advocacy courses have made substantial gains.[4] As Professor Steven Lubet has written, advocacy instruction has "matured from a sideline into a discipline."[5] At most law schools, full-time faculty members

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1 HARVARD L. SCH. ASS'N, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 84-85 (1918).

2 *See* Bellow, *Clinical Legal Education Undergoes Changes*, 13 SYLLABUS, Dec. 1982, at 7 ("clinicians have been confronted with the realities of their dependence, for tenure and continued funding, on skeptical and sometimes hostile faculties and administrations").

3 *See generally* Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123 (1987).

4 *See* Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 322 (1982) ("a 'quiet revolution' has advanced clinical legal education, lawyering skills, and involvement of practitioners in such instruction" (quoting Brink, *Legal Education for Competence–A Shared Responsibility*, WASH. U.L.Q. 591, 593 (1981))).

5 Lubet, *supra* note 3, at 124.

have assumed primary responsibility for the courses.[6] Predictably, the quantity and quality of the teaching materials for advocacy courses have increased dramatically.

Nevertheless, it would be a mistake to conclude that advocacy instruction has been fully integrated into the law school curriculum. To begin with, there is some lingering resentment toward advocacy instruction. Many traditionalists believe that outsiders—the judiciary and the practicing bar—forced the expansion of advocacy training on the law school community.[7] It is certainly true that most criticism of the law schools' neglect of advocacy training originated with judges and practitioners.[8] Moreover, to some extent, professors teaching advocacy courses still feel "isolated" from their colleagues teaching substantive law courses in "the institutional mainstream."[9] There have been some, nascent efforts to incorporate skills training into substantive law courses;[10] but for the most part, there has been little interaction between the substantive law courses and advocacy instruction.[11] The two types of courses peacefully coexist in the curriculum,[12] but they have yet to form a genuine partnership.

The thesis of this Article is that the development of a genuine partnership is not only desirable but imperative. The purpose of this paper is to formulate the broad parameters of a plan for the future of advocacy instruction in law schools. The first part of this paper asks whether advocacy teachers can simply assume that the status quo of peaceful coexistence will continue indefinitely. The paper concludes that this assumption is suspect. Assuming that curricular change is likely, the next section of the paper speculates about the future of advocacy instruction if there is no concerted effort to integrate advocacy instruction into the curricular mainstream. This section concludes that without a concerted ef-

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6 *See id.*

7 *See, e.g.*, Cramton, *supra* note 4, at 321, noting that Chief Justice Burger's criticisms provoked a dialogue on the shortcomings of law schools.

8 *See* Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979).

9 Burg, *Clinic in the Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232, 232 (1987).

10 *See, e.g.*, Herwitz, *Teaching Skills in a Business Law Setting: A Course in Business Lawyering*, 37 J. LEGAL EDUC. 261 (1987); Little, *Skills Training in the Torts Course*, 31 J. LEGAL EDUC. (1981); Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555 (1989).

11 *See generally* Burg, *supra* note 9.

12 *See generally* Tomain & Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307 (1990).

fort at integration, the support for advocacy training may wane. The third and final part of the paper proposes a plan for integration—a plan which imposes mutual duties on advocacy and substantive law instructors. This paper argues that the formation of a true partnership between advocacy and substantive law teachers can deepen the educational value of both types of law school instruction.[13]

I. THE ASSUMPTION THAT THE STATUS QUO OF PEACEFUL COEXISTENCE WILL CONTINUE INDEFINITELY

Do we, as advocacy instructors, even have the option of resting on our laurels? Can we confidently assume that without additional effort to integrate advocacy instruction into the curricular mainstream, the status quo will continue indefinitely? It is submitted that we cannot make that assumption and do not have that option.

That assumption is clearly at odds with the historical experience. In recent years, the law school curriculum has been anything but static. The Critical Legal Studies movement has challenged the content of many existing courses in the curriculum.[14] At the same time, we have witnessed an explosion in the number of alternative dispute resolution courses.[15]

A state of curricular flux is understandable and expectable. In substantive law courses, teachers help their students trace the evolution of dynamic bodies of law.[16] As part of the legacy of Legal Realism, contemporary law teachers train their students to question received orthodoxy and adopt a skeptical attitude toward the status quo.[17] It is difficult to confine that attitude to the conventional doctrines evaluated in substantive law courses. The natural human tendency is for that attitude to spillover and to lead law teachers to question the courses themselves, that is, the struc-

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13 *See* Cramton, *supra* note 4, at 331.

14 *See generally* Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 711-12 (1987); Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

15 164 law schools now offer one or more courses in alternate dispute resolution. 42 LAW SCHOOL NEWS, Feb. 1990, at 2. 574 professors are teaching the courses. *Id.*

16 *See, e.g.*, E. FARNSWORTH & W. YOUNG, CONTRACTS: CASES AND MATERIALS 213-45 (4th ed. 1988) (documenting the evolution of the promissory estoppel doctrine in contract law).

17 *See* Tushnet, *supra* note 14.

ture of the curriculum. If we cannot assume that old law is necessarily still good law, why should we assume that the current curricular structure is still sound? Like a substantive law doctrine, a curricular structure can become obsolete.

II. THE FUTURE OF ADVOCACY INSTRUCTION WITHOUT FURTHER EFFORT TO INTEGRATE ADVOCACY INSTRUCTION INTO THE MAINSTREAM OF THE LAW SCHOOL CURRICULUM

Of course, the probability of curricular change does not dictate the conclusion that advocacy instruction at law schools will wane in the near future. Quite to the contrary, things might get better rather than worse. Nevertheless, advocacy teachers must realistically assess the prospects for their courses. In assessing those prospects, advocacy teachers cannot engage in naive meliorism; they cannot blithely assume that their colleagues will embrace advocacy instruction more warmly in the future. Unfortunately, a realistic assessment suggests that for several reasons, without a concerted effort to integrate advocacy training into the curriculum, the coming years may be bad times for advocacy instruction.

One reason is economic. Advocacy courses tend to have lower student-teacher ratios than traditional courses.[18] As a consequence, the courses are relatively expensive to staff.[19] The average cost per student credit hour of an advocacy course is several times the average cost of the normal substantive law course.[20] In a time of increasingly scarce resources,[21] law school administrators are constantly searching for means to tighten their budgets.

In the early 1980s there were frightening projections of a sharp downturn in the number of applications to law schools.[22]

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18 *See* Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 84 (1979). At the University of California at Davis, for the purposes of conducting the laboratory sessions in Trial Practice, we break the class down into small sections. In some semesters, the student-teacher ratio in the small sections is as low as eight students per professor.

19 *Id.* at 96, 100.

20 Burg, *supra* note 9, at 233 n.4 (1987) ("In 1978-79 the average cost per student credit hour for law school supervised clinics was in the $320-$728 range, significantly higher than the $71 figure for classroom courses; although a better point of comparison might be the $348 per-credit cost of a typical simulation course.").

21 *See* Barnhizer, *supra* note 18, at 148.

22 *See* Vernon & Zimmer, *The Demand for Legal Education: 1984 and the Future*, 35 J. LEGAL EDUC. 261 (1985).

That downturn has yet to materialize.[23] The high level of law school applications has given us a reprieve; most law schools have not had to cope with sharply declining applications or budgets. However, the reprieve may be short-lived. The Law School Admissions Service (LSAS) recently reported a 3.3% decrease in the number of LSAT registrants.[24] The LSAS warned that the decrease "may herald an end to . . . [the] rise in applications."[25] The new president of the LSAS, Professor Peter Winograd, recently stated that it "might be expected that" widespread reports of an oversupply of lawyers nationwide "would have some impact on those who are thinking about their future careers."[26] He cautioned that "law schools would do well . . . to consider how they can best deal with a downturn of at least moderate proportion" in applications.[27] Even worse, law school tuition continues to increase at a rate faster than inflation.[28]

The level of demand for graduate education can change rapidly. In the 1970s the experts projected continued strong demand for dental education. Those projections proved to be erroneous, and in 1989, several prominent universities, including Emory, Georgetown, and Washington, announced that they were closing their dental schools.[29] The dire predictions of the 1980s for a significant decrease in the number of law school applications could come to pass in the 1990s. If those predictions materialize, law school administrators may take another hard look at the funding for their costly,[30] labor-intensive advocacy courses.

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23 *See* COUNCIL OF THE AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LONG-RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED STATES 15 (1987).

24 *Applicant Flood Abates*, Nat'l L. J., May 7, 1990, at 4 [hereainfter *Applicant Flood*]. *See also* Vaseleck, *Law School Popularity Increases, But Growth Rate Slows*, 21 SYLLABUS, Spr. 1990, at 1, 7 ("The reversal of the downward trend in demand for legal education that occurred in the mid-1970s and early 1980s continues, but at a slower rate than in recent years . . . . A comparison of test-taking trends over the current year and the last shows that fewer test-takers sat for the June administration in 1989-90. There were 22,100 LSATs administered in June 1989 as opposed to 23,100 in June 1988, a decline of slightly more than 4%.").

25 *Applicant Flood*, *supra* note 24, at 4.

26 Winograd, *Planning for Uncertainty*, LAW SERVICES REP., Nov.-Dec. 1990/Jan. 1991, at 2.

27 *Id.*

28 *See Economic Woes Hit Law Schools*, 2 CAL. LAW. 18 (Nov. 1982).

29 *See* AMERICAN DENTAL ASS'N, ANNUAL REPORT: DENTAL EDUCATION 1989/90 5 (1990). *See also* AMERICAN DENTAL ASS'N, SUPPLEMENT 2: TREND ANALYSIS (1990).

30 *See* Burg, *supra* note 9, at 232-33 & n.4.

The second reason is that the intellectual gap between the advocacy and substantive law courses is growing. If the content of teachers' law review writings is any indication, the gap is widening. Law teachers were once content to teach and write at the intermediate level of abstraction of the normal appellate decision.[31] However, in the past decade the articles in the better reviews have become increasingly abstract.[32] The law-and-economics movement has had a profound impact on commercial law scholarship.[33] Many modern evidence scholars have shifted their attention to the relationship between doctrine and statistical theory.[34] Similarly, constitutional law commentators now focus much more intensely on meta-theory such as the significance of the republican tradition.[35]

In contrast, most advocacy courses still seem to deal essentially with the practicalities of forensic technique.[36] Many advocacy courses neglect "the intellectual dimension."[37] In the words of one commentator, advocacy courses may need an "injection of analytic instruction."[38] The gulf between advocacy and substantive law courses is growing; while substantive law courses increasingly concentrate on more theoretical issues, advocacy courses maintain "a status quo conservatism."[39] If law school administrators need to reduce law school budgets, advocacy instructors may find fewer allies among their colleagues to resist inroads on the support for advocacy courses.

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31 *See* Cramton, *supra* note 4, at 331.

32 *See* Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989).

33 *See, e.g.*, *Economics of Contract Law*, 52 LAW & CONTEMP. PROBS., Wint. 1989, at 1-209; Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 ANN. SURV. AM. LAW 73.

34 *See, e.g.*, Brilmayer, *Second-Order Evidence and Bayesian Logic*, 66 B.U.L. REV. 673 (1986); Cohen, *The Role of Evidential Weight in Criminal Proof*, 66 B.U.L. REV. 635 (1986); Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54 (1987).

35 *See* Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

36 *See* Lubet, *supra* note 3, at 126. *See also* Ayer, *Foreword* to R. KLONOFF & P. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS at xiii (1990) ("The teaching provided in this area has been almost entirely mechanical . . . . We can tell someone where to sit or stand, how close to get to the jury, and when to approach the witness"); Tomain & Solimine, *supra* note 12, at 313, 318 (lawyering skills teachers must "go beyond technique and link means and ends").

37 Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 604 (1983).

38 Lubet, *supra* note 3, at 135.

39 Condlin, *supra* note 37, at 608.

It may be especially difficult to resist those inroads because there are new proposed courses competing for scarce law school resources[40]—courses which substantive law instructors may feel more comfortable supporting. There is mounting enthusiasm for new legislation courses. This is the Age of Statutes.[41] Yet only a minority of law schools have legislation courses.[42] At most schools offering the course, the course is an elective[43] taken by only a small percentage of the school's students. An increasing number of commentators are calling for more curricular emphasis on legislation.[44] That call is likely to be supported by many substantive law professors; the contemporary debate over statutory interpretation implicates the types of theoretical concerns—the impact of the law-and-economics movement,[45] Critical Legal Studies,[46] and the republican revival[47]—with which many substantive law professors are fascinated.[48] Given a choice between supporting advocacy instruction and shifting resources to new courses such as legislation, a significant number of law faculty members might be inclined to choose the latter.

III. A PLAN FOR INTEGRATING ADVOCACY INSTRUCTION INTO THE MAINSTREAM OF THE LAW SCHOOL CURRICULUM: THE MUTUAL DUTIES OF RESPECT AND COOPERATION

In the past, advocacy teachers have advanced proposals for reforming the law school curriculum, but for the most part they have limited the scope of their proposals to recommendations for revising their own part of the curriculum.[49] Many of those recommendations have been sound and helpful, but the implementation of such limited proposals will not effect the integration of the advocacy course into the curriculum. To achieve that integra-

40 *See* Barnhizer, *supra* note 18, at 148.

41 C. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

42 *See* Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 664 (1987).

43 *Id.*

44 *See, e.g.*, Eskridge & Frickey, *supra* note 14.

45 *Id.* at 708-09.

46 *Id.* at 711-12.

47 *Id.* at 718.

48 *See generally* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988).

49 *See, e.g.*, Barnhizer, *supra* note 18.

tion, we must develop a broader vision, a model for interaction between the advocacy and substantive law courses.

That vision requires the recognition of two duties on the part of both advocacy and substantive law teachers. One duty is respect. This duty is essentially a negative obligation: Advocacy instructors should not undermine the work done by substantive law instructors, and vice versa. Hence, an advocacy teacher should avoid unnecessarily disparaging the analytic skills taught in the substantive law courses; unnecessary disparagement directly violates the duty of respect. Nor should the advocacy instructor ignore those skills as if they were unimportant to the advocate; doing so would constitute an indirect violation of the duty.

The second duty is cooperation. This duty is an affirmative obligation; advocacy and substantive law instructors must not only set the stage for each other's courses but also build upon the work done in each other's courses.[50] To end the isolation of advocacy teachers[51] and progress beyond a state of peaceful co-existence with substantive law courses, we must develop a strategy to promote interaction between the two types of courses. The purpose of this subsection of the paper is to detail that strategy.

A. The Duty of Respect

1. The Duty of Substantive Law Teachers

While explaining either a Legal Realist or Critical Legal Studies[52] perspective in a substantive law course, a teacher can inadvertently understate the constructive role that the advocate can play in resolving a dispute. Both perspectives have undeniable merit. The realists correctly suggest that the individual decision-maker's preconceptions often distort the application of rules of law. For their part, the critical theorists are on firm ground when they charge that power elites frequently succeed in imposing their will on the majority "under the 'rule of law.'"[53] However, it is an overstatement to give students the impression that all legal outcomes are explicable solely or even primarily in terms of either the individual judge's prejudices or a dominant class' self-interest.

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50 On the role of clinicians, see Burg, *supra* note 9, at 252 (clinicians "need to make their teaching skills and methods available in the classroom and to their colleagues who work there").

51 For one instructor's experience, see *id.* at 232-33.

52 *See generally* Tushnet, *supra* note 14.

53 Eskridge & Frickey, *supra* note 14, at 710-12.

Those factors can certainly bias the decision-maker in favor of a particular outcome. Nevertheless, in a given case an advocate may be able to overcome such bias. An essential component of advocacy training is learning to anticipate and surmount the decision-maker's biases.[54]

While it is vital that the substantive law instructor refrain from unnecessarily disparaging the skills taught in advocacy courses, it is equally critical that the instructor not disregard the subject matter of advocacy training. If a substantive law instructor neglects that subject matter, he or she sends a subtle signal to the student that in their judgment, the subject matter is unimportant. Consider, for example, a Constitutional Law or Criminal Procedure teacher covering *Washington v. Texas*,[55] the Supreme Court's landmark decision announcing that the fourteenth amendment's due process clause incorporates the sixth amendment's compulsory process guarantee. The *Washington* case reached the Court only because the defense counsel was sufficiently familiar with trial procedure to appreciate the need to make an offer of proof on the record.[56] *Washington* gives the substantive law instructor a perfect opportunity to emphasize the necessity to master the material taught in the trial practice course. We have the *Washington* precedent today only because the defense counsel in that case had mastered both advocacy and analytic skills. Substantive law instructors should use opinions such as *Washington* to stress the need to develop both sets of skills.

Seminal cases such as *Henningsen v. Bloomfield Motors, Inc.*[57] afford the substantive law instructor the chance to show her students the interface between doctrine and advocacy skills. Suppose that a seminal case has reached the trial stage. The trial judge must instruct the jury on the plaintiff's novel theory of recovery or the avant-garde defense. Since the case raises a novel theory, the trial judge cannot rely on a pattern instruction. Rather, the attorney urging the theory must draft a special instruction for the judge. "To generate the . . . [instruction], the attorney must be able to predict the policy concerns that will motivate the court to change the law. Further, the attorney must be able to identify the

54 *See* R. CARLSON & E. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 4.6, at 46 (1989).

55 388 U.S. 14 (1967).

56 *Id.* at 16; *see also* FED. R. EVID. 103(a)(2).

57 32 N.J. 358, 161 A.2d 69 (1960).

facts to be listed in the instruction to implicate those policies."[58] Fact situations such as *Washington* and *Henningsen* give the substantive law teacher a wonderful opportunity to point out that in cutting-edge law reform litigation the attorney needs advocacy skills as well as the analytic skills learned in substantive law courses.[59]

2. The Duty of Advocacy Teachers

The preceding paragraphs discussed the duty of respect substantive law teachers owe advocacy teachers. This duty must be a two-way street. For their part, advocacy teachers owe substantive law teachers a correlative duty.

Like their counterparts, advocacy teachers must refrain from unnecessarily disparaging the work done in substantive law courses. Just as substantive law instructors can understate the constructive role of the advocate, advocacy teachers may sometimes be tempted to downplay the role which doctrine plays in the outcome of cases. On the one hand, the advocacy teacher must impress upon students the insight that non-doctrinal factors such as the attorneys' and witnesses' demeanor[60] can influence the outcome. On the other hand, it is unnecessary and misleading to suggest that doctrine is unimportant. The available empirical studies generally indicate that the more intelligent, better educated jurors exercise disproportionate influence during deliberations.[61] More specifically, if the attorney properly highlights a doctrinal jury instruction, that instruction can have a decisive impact on the outcome.[62] It is always possible that the jury will become confused or nullify the substantive law. The advocacy teacher, however, must give the students a balanced assessment of the relative importance of the various factors which may affect a legal outcome. In a balanced assessment, substantive doctrine will play an important role.

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58 Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663, 679 (1989).

59 *See id.*

60 *See* Austin, *Why Jurors Don't Heed the Trial*, Nat'l L.J., Aug. 12, 1985, at 18.

61 *See, e.g.*, V. HANS & N. VIDMAR, JUDGING THE JURY (1986); S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 178 (1988); W. WAGNER, ART OF ADVOCACY: JURY SELECTION § 1.04[3] (1988); A. WERCHICK, MODERN CIVIL JURY SELECTION § 8.03 (1988).

62 *See* Dombroff, *Jury Instructions Can Be Crucial in the Trial Process*, Legal Times, Feb. 25, 1985, at 26 ("giving more consideration to the process of drafting and using jury instructions will pay substantial dividends that may translate into trial results").

Again, like their counterparts, advocacy teachers must eschew indirect violations of the duty of respect. The advocacy teacher must avoid neglecting the work of substantive law teachers and thereby sending the students the message that that material is inconsequential. One of the most important parts of the substantive law teacher's work is developing a spirit of law reform among his students—inculcating the sense that as concerned citizens and legal experts, attorneys have a special responsibility to facilitate the reform of the legal system.[63] Class discussion of cases such as *Washington* and *Henningsen* affords the substantive law teacher an opportunity to address the process of law reform.

Unfortunately, in many advocacy courses, the teacher simply accepts the current judicial system as a given and is content with the identification of the best strategies and tactics for litigating cases within the existing system. As previously stated, many advocacy courses evidence a "status quo conservatism."[64] Much of the advocacy literature is deficient in the same sense. Accepting the status quo as at least an implicit premise, the literature merely describes the most effective advocacy techniques under the current regime.[65] Advocacy teachers themselves have failed to "criticize . . . the existing arrangements and procedures of law practice."[66]

Advocacy teachers can no longer slight law reform issues. One of their principal educational tasks is to give the students a phenomenology of the legal system.[67] The operation of the system is not only shaped by the text of statutes and judicial opinions; it is also influenced by customary practices which are not reflected in statute or opinion. The advocacy teacher touches upon these practices and is, therefore, in a unique position to complete the student's understanding of the phenomenology.[68] Nevertheless, the advocacy teacher cannot regard the completion of the description of the system's operation merely as an end in

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63 Canon 8 of the American Bar Association's Code of Professional Responsibility decrees that "[a] lawyer should assist in improving the legal system." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980).

64 Condlin, *supra* note 37, at 608.

65 Both Professor Carlson and Professor Tanford have leveled this accusation. *See* Carlson, *Competency and Professionalism In Modern Litigation: The Role of the Law Schools*, 23 GA. L. REV. 689 (1989); Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623 (1986).

66 Condlin, *supra* note 37, at 604.

67 *See id.* at 610.

68 *See id.*

itself. The completion of the description is also a means to an end. Once the student gains the complete phenomenology, she can discern any problems impairing the system's operation and consider proposals for systemic reform in a more informed fashion.[69]

Some advocacy teachers will complain that they already have so much material to cover in their courses that there is no time to expand coverage to include law reform topics. However, that complaint is unsound. To perform the duty of respect owed the substantive law teacher, the advocacy teacher need not conduct a lengthy discussion of proposals for reforming the system. The advocacy teacher performs the duty by manifesting concern about law reform. In an introductory advocacy course, it may suffice for the teacher to raise questions about the need for reform—and to defer any in-depth evaluations of proposed solutions to advanced courses.

The treatment of jury instruction procedures in an advocacy course is a case in point. In most jury trials, the judge follows instruction procedures which virtually guarantee that the jurors will misunderstand many of the instructions.[70] For example, in the typical jury trial, the judge reads the jury the instructions "after the jury has heard days, weeks, or months of testimony [and argument] . . . . [S]ince the jurors learn the relevant legal rules after they hear the testimony, they do not even know what to listen for during the testimony [and argument]."[71] Even without an extended class discussion of the utility of preinstruction, the advocacy teacher can quickly lead the student to realize that this procedure is idiotic.[72] By occasionally devoting a few minutes of class time to posing law reform questions, the advocacy teacher can make it clear to the student that law reform is an important concern in advocacy training—just as it is in the student's substantive law courses.

If the advocacy teacher is so inclined, the teacher can undoubtedly make the time to explore far more radical law reform proposals in the course. In the hands of a reformist teacher, an advocacy course can become a vehicle for critiquing the legal system and the rules the system administers. For example, advoca-

69 *See* Barnhizer, *supra* note 18, at 76.
70 R. CARLSON & E. IMWINKELRIED, *supra* note 54, § 13.2.
71 *Id.* § 13.2, at 218.
72 *Id.*

cy training in a Prison or Poverty Law clinic can be an effective—even a superior—setting in which to expose students to a Critical Legal Studies perspective. The point, however, is that every advocacy teacher must manifest a genuine concern about law reform to her students. Doing anything less undercuts the law reform mindset which substantive law teachers endeavor to inculcate in their courses.

B. The Duty of Cooperation

At the bare minimum, the interactions between the advocacy and substantive law courses should not undermine the work done in either type of course. The recognition of a mutual duty of respect on the part of advocacy and substantive law teachers will help prevent such negative interactions. Ideally, the interaction should be positive and synergistic—a partnership which enriches the coursework in both types of classes. More specifically, each teacher should set the stage for the other type of course and, when possible, build upon the work done in the other type of course. To achieve synergy, both types of teachers must assume a duty of cooperation to the other.

1. The Duty of Substantive Law Teachers

In substantive law courses such as Contracts, the instructor attempts to teach students to analyze "raw facts" with "a surgeon's knife" to identify every plausible theory.[73] The student's possession of that analytic skill is a prerequisite for advocacy training; that is precisely the skill which the advocate exercises at the intake stage of a case.[74] During intake, the worst mistake an advocate can make is premature diagnosis.[75] The best way to avoid that mistake is to subject the facts to the imaginative, precise analysis modeled in substantive law courses. By teaching students to engage in creative, exacting factual analysis, the substantive law teacher sets the stage for advocacy courses. Entering into a partnership with advocacy teachers does not necessitate that substan-

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73 K. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 67, 147 (1960).

74 R. CARLSON & E. IMWINKELRIED, *supra* note 52, § 3.3(A). *See also* Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59, 65 (1986).

75 *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 86 (1977).

tive law teachers abandon or even deemphasize the traditional pedagogy Llewellyn recommended.

The contrary is true: the partnership reinforces the need for that pedagogy in substantive law courses. The advocacy teacher must be in a position to assume that his students have already largely mastered the skills of factual analysis. The advocacy teacher needs to be able to assume that his students can wring every possible legal theory from a fact situation. In part, his educational task is helping students develop the professional judgment needed to make an advocate's choice between and among theories.[76] The development of that judgment is a formidable, time-consuming task. It would be impossible for the advocacy teacher to perform that task unless the students enrolling in his course had already learned how to identify all the possible theories. The most valuable service the substantive law teacher can perform for the advocacy teacher is ensuring that the students completing substantive law courses receive rigorous training in analyzing the legal significance of facts.

At first, it might appear that the substantive law teacher's duty of cooperation requires only that the teacher set the stage for advocacy instruction. However, the duty is broader; the duty also mandates that the substantive law teacher build upon the work done by the advocacy teacher.

It is a mistake to assume that the vast majority of students defer their advocacy courses until their third year. At many law schools, a significant percentage of the students enrolled in advocacy courses are second-year students.[77] Some second-year students take advocacy courses early because they want a change of pace from the pedagogy of substantive law courses. Other second-year students are fortunate enough to attend a school with advanced advocacy courses. Second-year students at such schools often take the introductory advocacy courses early because the introductory courses are prerequisite to the advanced courses the students want to take in their third year. Finally, many second-year students take advocacy courses early because in their jurisdiction, certified law clerk programs permit them to appear in court.[78] Even if completion of an advocacy course is not a pre-

76 *See generally* Imwinkelried, *supra* note 74.

77 During the 1989-90 academic year at the University of California at Davis School of Law roughly one-third of the second-year class enrolled in the introductory Trial Practice course. In the second semester of that academic year second-year students comprised almost two-thirds of the enrollment in the course.

78 *E.g.*, STATE BAR CAL., STATE BAR OF CALIFORNIA RULES GOVERNING THE PRACTI-

requisite for certification, the student has an understandable incentive to enroll in an advocacy course before certification; advocacy training will make the student more comfortable when appearing in court. In any event, a substantial percentage of third-year students enrolled in upper-division substantive law courses have already received some advocacy instruction.

Substantive law teachers can enhance the quality[79] of their upper-division offerings by capitalizing on the instruction their students have already received in advocacy courses. Consider, for example, an elective offering in Advanced Civil Procedure. The teacher could address such controversial questions as whether we ought to retain the jury system and, if so, whether attorneys should actively participate in the voir dire examination of venirepersons. Students who have had even an introductory trial advocacy course can evaluate those questions with much greater sophistication. In large part, the desirability of retaining the jury is reducible to the question of whether lay jurors are capable of rationally deciding complex cases. Law students cannot intelligently debate that question until they appreciate the techniques which a good advocate can use to simplify a trial presentation for a jury—techniques such as selecting a single theory of the case,[80] sequencing witnesses to establish the conceptual framework of the case as soon as possible,[81] requesting preinstruction by the judge,[82] persuading the judge to allow an interim summation,[83] and using visual aids to highlight pivotal testimony.[84] Those techniques are usually learned in advocacy courses, but by drawing on her students' knowledge of those techniques, a substantive law instructor can teach an Advanced Civil Procedure course much more effectively.

Similarly, law students cannot intelligently analyze the desirability of active attorney voir dire until they have been exposed to the conventional strategy of jury *de*selection.[85] The attorney has

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CAL TRAINING OF LAW STUDENTS Rule 2 (1983) (allowing students enrolled in second year to become certified law students) and State Bar of California, Take Advantage of the State Bar of California Practical Training of Law Students Program (n.d.) (informational brochure).

79 *See* Cramton, *supra* note 4, at 331.

80 R. CARLSON & E. IMWINKELRIED, *supra* note 54, §§ 3.2, 3.4.

81 *Id.* § 9.3.

82 *See* Committee on Fed. Courts of the N.Y. State Bar Ass'n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549, 553-55 (1988).

83 *See id.* at 557-58.

84 R. CARLSON & E. IMWINKELRIED, *supra* note 54, § 9.2(B).

85 *See* Perlman, *Jury Selection*, DOCKET, Spr. 1988, at 1, 5 ("The advocate must view

neither the time nor sufficient strikes to choose a jury affirmatively biased in her client's favor.[86] Consequently, under this deselection strategy, the attorney's limited objective during voir dire examination is to identify and eliminate the venirepersons most likely to be negatively biased against the client. The critics of attorney participation in voir dire examination often contend that attorneys routinely abuse the jury selection process to indoctrinate the panel and bias the jury in their clients' favor. In any class discussion of attorney voir dire in an advanced procedure course, the teacher must mention that contention. The teacher can help the students evaluate that contention more acutely if the teacher can assume that at least some of the students are familiar with the jury deselection strategy.

2. The Duty of Advocacy Teachers

The advocacy teacher's duty parallels the duty of the substantive law teacher. As in the case of the substantive law teacher, the advocacy teacher must cooperate with the substantive law teacher by setting the stage for the substantive law teacher's work. The preceding discussion of an Advanced Civil Procedure course illustrates how the advocacy teacher can do so. The advocacy teacher completes the student's understanding of the phenomenology of the legal system.[87] As previously stated, the student cannot gain a complete understanding by merely reviewing the statutes and judicial opinions covered in the introductory substantive law course. The student typically completes her understanding only in the advocacy courses. The student's possession of that understanding permits the student to analyze the possibilities for systemic reform[88] far more critically in later, advanced substantive law courses. In short, by helping the student develop that phenomenology, the advocacy teacher facilitates more sophisticated, evaluative discussion in substantive law courses such as Advanced Civil Procedure and Alternative Dispute Resolution.

The parallel continues. Just as the substantive law instructor builds on the phenomenology completed by the advocacy teacher, the advocacy teacher builds on the analytic skills developed in the

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the title 'Jury Selection' as a misnomer, because the selection process had been concluded, and it is now time to eliminate those jurors who appear to be the least desirable.").

86 R. CARLSON & E. IMWINKELRIED, *supra* note 54, § 4.6(E), at 52.

87 *See* Condlin, *supra* note 37, at 610.

88 *See* Barnhizer, *supra* note 18, at 76-77.

substantive law courses. After taking a number of substantive law courses, the student should have developed the ability to identify all the possible theories suggested by a fact situation. The advocacy teacher takes that ability as a given and helps the student develop the sense of professional judgment which enables an advocate to choose among potential theories for the case. In making that choice, the advocate must consider whether the theory is supported by persuasive corroborating evidence.[89] In Civil Procedure, the student learns that a count in a pleading must have sufficient supporting evidence to survive a directed verdict motion. However, to be successful, a trial theory needs more factual merit than the minimal quantum of evidence needed to defeat a motion for a directed verdict. The advocate must also consider whether the theory casts the client in a role which the decisionmaker can easily empathize with.[90] In Contracts, the student studies the facts which a pleading must allege to state a legally sufficient cause or defense. However, it is not enough that the theory has enough legal merit to survive a demurrer or motion to dismiss. The advocate can win the battle while losing the war; the advocate's theory may pass the muster of a demurrer—only to be rejected by a jury which finds it difficult to identify with the client. By forcing the student to weigh these factors, the advocacy teacher helps the student to realize that she cannot be content to be a legal technician. The advocate must become a counselor capable of exercising prudential judgment.[91] The student must appreciate that she will become a competent practitioner only when she weds the analytic skills learned in substantive law courses to the professional judgment developed in advocacy courses.

IV. CONCLUSION

I must confess that I have a vested interest in this topic. In most academic years since 1974, I have taught both Contracts and Trial Advocacy. During that time, I have desperately attempted to avoid schizophrenia. I would like to think that my teaching in Contracts has something to do with my teaching in Trial Advocacy. On a small scale, I have attempted to develop the type of synergy urged in this paper. In Contracts, I often preview what

89 Imwinkelried, *supra* note 74, at 68.
90 *Id.* at 69.
91 *Id.* at 68.

the students will learn in Trial Advocacy.[92] For instance, after helping the students pull every theory out of the fact pattern in a Contracts case, I sometimes conduct a short class discussion to help the students see that the attorney would not necessarily press all the theories at trial. At that point, we briefly consider the factors which make one theory preferable to the others. Similarly, in Trial Advocacy, I frequently hark back to what the students learned in Contracts and attempt to build on the analytic skills they learned in that course. The first written assignment in Trial Advocacy is a strategic evaluation of the case which the student is assigned for the laboratories. As part of that evaluation, the student must identify all the theories raised by the case. I tell the students that when they are identifying those theories, I expect them to be as precise and imaginative as they were on their Contracts examinations.

My personal experience has convinced me that as a general proposition it is possible to attain synergy in the law school curriculum. The interactions occurring at this conference are further evidence that we can realize the possibility for synergy. This conference is only one of the procedural mechanisms which we can use to increase the interaction in the curriculum. Advocacy instructors can circulate their draft manuscripts to colleagues teaching Jurisprudence as well as to their fellow advocacy teachers. If the subject matter of a mock trial is a Torts dispute, the advocacy teacher can invite a Torts teacher to critique the participants. When an exercise in a pretrial practice course will be based on a Property problem, the advocacy teacher can seek a Property colleague to team teach the block of instruction.

These procedural devices can be helpful in forging a fuller partnership between advocacy and substantive law teachers. However, the thesis of this Article is that the partnership will emerge only if there is a more fundamental reform: both types of teachers must revise the coverage and content of their classes. In leading the class discussions in their respective courses, both types of teachers must recognize their duties of respect and cooperation.

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92 Throughout the Contracts course, I give the students recommended readings in E. IMWINKELRIED, CONTRACT LAWSUITS: TRIAL STRATEGIES AND TECHNIQUES (2d ed. 1989). For example, for the classes devoted to the concept of offer, I assign the sections of the illustrating lines of questions designed to prove that an offer was made. Once the students see that the litigator needs to prove precise, discrete facts at trial, the students better understand why I am so insistent that they pay attention to the exact facts in the opinions they brief for class.

Each type of teacher must respect and build on the intellectual enterprise conducted by the other. Advocacy courses do not have to merely peacefully coexist with substantive law courses. Rather, advocacy courses can enter the mainstream and interact positively with substantive law courses. The two types of courses can reinforce and mutually enrich each other. The end result of the interaction will hopefully be more intellectually stimulating advocacy courses and more sophisticated substantive law courses.